Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1560–07 OF 2018 AND W-02(C)(A)-1562–07 OF 2018

KAMARDIN HASHIM, NANTHA BALAN AND LEE HENG CHEONG JJCA

8 OCTOBER 2020

Arbitration — Award — Setting aside — Arbitrator failing to make award within time limit specified — Application to set aside award — Whether the timeline for delivery of arbitration award was a procedural or jurisdictional provision — Whether failure of parties to raise objection amounted to a waiver — Whether non-compliance with timeline was fatal to the arbitrator's mandate and jurisdiction — Arbitration Act 2005 s 37(1)(a)(vi)

This was an appeal against the decision of the learned judge of the High Court ('HCJ') dated 9 July 2018 wherein an arbitration award dated 10 March 2017 ('the original award') as amended by the subsequent award dated 7 April 2017 was set aside under s 37(1)(a)(vi) of the Arbitration Act 2005 ('the Act'). The overarching issue was whether an arbitration award, which was issued in circumstances where the arbitrator was tardy in delivering the award in accordance with the timelines stipulated in the applicable rules of arbitration, could be set aside under s 37(1)(a)(vi) of the Act. Despite the arbitrator's tardiness, the parties to the arbitration did not raise any objection during the relevant period from the last date by which the award ought to have been delivered, until the date when the award was in fact delivered. The objection was only raised after the award was delivered on 10 March 2017. The appellant in the present appeal took the position that such silence or inaction on the part of the respondent prior to the award being delivered on 10 March 2017 amounted to a 'waiver' of the irregularity in terms of the arbitrators' obligation to comply with article 21.3 of the Pertubuhan Akitek Malaysia ('PAM') Arbitration Rules 2003 ('PAM Rules') which concerned the timelines for the delivery of the award. The critical question was whether rules of arbitration which expressly stipulated a timeline for delivery of the award went to the arbitrator's mandate and/or jurisdiction and consequently whether as a result of the non-compliance with the timeline, the arbitrator ceased to have the requisite mandate and/or jurisdiction. The first appeal was Appeal No W-02(C)(A)-1560–07 of 2018 ('Appeal 1560') and the second appeal was Appeal No W-02(C)(A)-1562–07 of 2018 ('Appeal 1562').

Held, dismissing both the appellant's appeals and further dismissing the respondent's cross-appeal:

(1) Although the court had the discretion under O 53 r 3(7) of the Rules of Court 2012 to extend time for commencement of judicial review proceedings, time was nevertheless a jurisdictional matter in that context. If an application for judicial review was made out of time and if there was no application to extend time, and/or if the application for extension of time fails, then the judicial review fell in limine as the court would lack the requisite jurisdiction to hear the judicial review application. The court did not agree that the mere presence of an in-built contractual mechanism per article 21.3 of the PAM Rules, which enabled the arbitrator to unilaterally extend time derogated from the arbitrator's duty to deliver the award within the time period as prescribed in article 21.3 and which necessarily and fundamentally affected the arbitrator's mandate and jurisdiction. The timeline in article 21.3 was a mandate to the arbitrator that the arbitrator was to deliver the award by a certain date and if required more time, then the arbitrator had to extend time by notifying the parties. The arbitrator's mandate was not a matter of mere procedure. Rather, the arbitrator's jurisdiction sprang from his mandate. Once the mandate ceased, then the jurisdiction also ceased (see paras 126 & 128).

(2) Even if the rules of arbitration empowered the arbitrator to extend time and even if there was no objection by the parties after the deadline had passed, the failure on the part of the arbitrator to adhere to the timeline stipulated in the rules of arbitration was of itself, fatal, as such non-compliance with a crucial timeline deprived the arbitrator of his mandate and therefore his jurisdiction. The court rejected the suggestion that article 21.3 was merely procedural. On the contrary, it was inherently and fundamentally, jurisdictional. Thus, so long as the timeline for delivery of the award had passed and time had not been extended as per the rules of arbitration, then the arbitrator's authority, mandate and jurisdiction would have ceased (see paras 133–134 & 137).

(3) The court of the view that whilst generally there can be a waiver of the matters or content of what was deliberated or what transpires in the arbitration proceedings, there can be no waiver on the part of the parties to the arbitration with respect to the cessation of the arbitrator's mandate and jurisdiction in relation to the obligation to deliver the award on time or within an extended period. Hence, RKT's silence or inaction prior to the original award being issued was irrelevant. Since the arbitrator ignored, or overlooked, or was plainly oblivious or nonchalant to the timeline stipulated in article 21.3 of the PAM Rules, and as there is no scope for any waiver, it follows that the arbitrator was no longer following the rules of arbitration. Such conduct on the arbitrator's part fell neatly

within s 37(1)(a)(vi) of the Act which provides that an award may be set aside if 'the arbitral procedure was not in accordance with the agreement of the parties'. If an application under s 46 of the Act has been made and the court has granted an extension of time, then the arbitrator's mandate and jurisdiction would have been resurrected, but not otherwise. Parties who remain silent and participate in the arbitration and allow an arbitrator to deal with a 'dispute not contemplated by or not falling within the terms of the submission to arbitration' per s 37(1)(a)(iv) or allow an arbitrator to deal with matters beyond the scope of the submission to arbitration per s 37(1)(a)(v) may be precluded from raising an objection (see paras 143–145, 147 & 149).

(4) Section 46 of the Act adds to or underscores the jurisdictional dimension of article 21.3 of the PAM Rules and it was quite fundamental to the arbitral process. Thus, if for any valid reason, an arbitration award was delayed and time has not been extended, then it was up to the parties or the arbitrator to move the court under s 46 so that time was extended for the delivery of the award. The court may not extend time on its own volition under s 46 of the Act. It follows as a matter of logic that if no extension was sought or, if sought and the application fails, then the award was quite figuratively 'dead in the water' (see paras 153 & 156–157).

(5) The court agreed with the HCJ that by failing to deliver the original award within the timeframe stipulated in the PAM Rules and in further failing to extend the deadline as provided for, before delivering the original award on 10 March 2017, the original award was delivered 'without mandate or authority' and was therefore in excess of the arbitrator's jurisdiction, The original award was properly and validly set aside pursuant to s 37(1)(a)(vi) of the Act (see para 160).

(6) In the circumstances, the court was satisfied that the HCJ had applied her mind to all the relevant facts and circumstances of the case and had also properly directed herself upon the principles of law that were applicable to the case before her. The appellant had failed to demonstrate any error on the part of the HCJ as would warrant any appellate intervention (see para 161).

[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap keputusan hakim Mahkamah Tinggi ('HMT') bertarikh 9 Julai 2018 yang mana satu awad timbangtara bertarikh 10 Mac 2017 ('award asal') sepertimana dipinda oleh award kemudian bertarikh 7 April 2017 diketepikan di bawah s 37(1)(a)(vi) Akta Timbang Tara 2006 ('Akta tersebut'). Isu adalah sama ada sata awad timbangtara bertepatan dengan had masa yang dinyatakan dalam kaedah timbangtara yang terpakai, boleh diketepikan di bawah s 37(1)(a)(vi) Akta tersebut. Walaupun kelewatan

penimbangtara, pihak-pihak kepada timbangtara tidak menimbulkan apa-apa bantahan sewaktu masa yang relevan daripada tarikh akhir award sepatutnya diberikan, sehingga tarikh award diberikan. Bantahan hanya dibangkitkan selepas awad diberikan pada 10 Mac 2017. Perayu dalam rayuan ini mengambil kedudukan bahawa tindakan berdiam diri, atau tinda mengambil apa-apa tindakan pada pihak responden sebelum award dikeluarkan pada 10 Mac 2017 terjumlah kepada satu pengenepian ketidakpatuhan terma tanggungjawab penimbangtara untuk mematuhi perkara 21.3 Kaedah Timbangtara Pertubuhan Arkitek Malaysia ('PAM') 2003 ('Kaedah PAM') yang melibatkan tempoh masa untuk memberikan satu award. Persoalan kritikal adalah sama ada kaedah timbangtara yang secara nyata memberikan tempoh masa untuk memberikan award pergi kepada mandat penimbangtara dan/atau bidang kuasa dan sama ada sebagai kesan tidak lagi mempunyai mandat yang diperlukan dan/atau bidang kuasa. Rayuan pertama merupakan Rayuan No W-02(C)(A)-1560–07 of 2018 ('Rayuan 1560') dan rayuan kedua merupakan Rayuan No W-02(C)(a)-1562–07 Tahun 2018 ('Rayuan 1562').

Diputuskan, rayuan kedua-dua perayu ditolak dan selanjutnya menolak rayuan silang responden:

(1) Walaupun mahkamah mempunyai budi bicara di bawah A 53 k 3(7) Kaedah-Kaedah Mahkamah 2012 untuk memanjangkan masa untuk memulakan prosiding semakan kehakiman, masa tetap merupakan perkara bidang kuasa di dalam konteks tersebut. Sekiranya tiada permohonan untuk memanjangkan masa, dan/atau sekiranya permohonan untuk memanjangkan masa gagal, makan semakan kehakiman akan turut gagal kerana mahkamah tiada bidangkuasa untuk mendengar permohonan semakan kehakiman tersebut. Mahkamah tidak bersetuju bahawa kehadiran satu mekanisma kontraktual sedia ada seperti perkara 21.3 Kaedah PAM, yang membenarkan penimbangtara secara sendirinya melanjutkan tempoh masa mengikis tanggungjawab penimbangtara untuk memberikan award dalam tempoh masa yang ditetapkan dalam perkara 21.3 yang seharusnya dan secara asasnya memberi kesan kepada mandat dan bidang kuasa penimbangtara tersebut. Tempoh masa dalam perkara 21.3 merupakan satu mandat kepada penimbangtara bahawa penimbangtara tersebut perlu memberikan award pada tarikh yang ditetapkan dan sekiranya memerlukan lebih masa, maka penimbangtara tersebut perlu melanjutkan masa dengan memaklumkan pihak-pihak. Mandat penimbangara bukan sekadar prosedur semata-mata. Akan tetapi bidang kuasa penimbangtara datang daripada mandatnya. Apabila mandat tersebut tamat, bidang kuasanya juga tamat (lihat perenggan 126 & 128).

(2) Walaupun kaedah timbangtara memberi kuasa kepada penimbangtara untuk melanjutkan masa dan sekiranya tiada bantahan oleh pihak-pihak

selepas had masa telah berlalu, kegagalan pada pihak penimbangtara untuk mematuhi tempoh masa yang ditetapkan dalam kaedah timbangtara adalah fatal, oleh itu, ketidakpatuhan dengan satu tempoh masa yang penting menidakkan penimbangtara akan mandatnya dan oleh yang demikian bidang kuasanya. Mahkamah menolak cadangan bahawa perkara 21.3 hanyalah prosedural. Sebaliknya ianya adalah secara asas melibatkan bidangkuasa. Oleh yang demikian selagi mana tempoh masa untuk mmeberikan award telah luput dan masa tidak dipanjangkan sepertimana kaedah timbangtara, autoriti penimbangtara, mandat dan bidang kuasanya telah tamat (lihat perenggan 133–134 & 137).

(3) Mahkamah berpandangan bahawa secara amnya boleh wujud penepian atas isu yang dibincangkan atau perkara yang berlaku dalam prosiding timbangtara, tidak boleh wujud penepian oleh pihak kepada timbangtara berkaitan dengan penamatan mandat dan bidang kuasa penimbangtara berkaitan dengan tanggungjawab untuk memberikan awad pada masa atau dalam tempoh masa yang dilanjutkan. Oleh yang demkian, apabila RKT diam atau tidak mengambil tindakan sebelum awad asal diberikan adalah tidak relevan. Atas sebab penimbangtara tidak menghiraukan, terlepas pandang, atau tidak mengambil tahu atau mengambil kisah kepada tempoh masa yang ditetapkan dalam perkara 21.3 Kaedah PAM, dan kerana tiada skop untuk apa-apa penepian, oleh yang demkian, penimbangtara tidak lagi mematuhi kaedah-kaedah timbangtara. Pelakuan sedemikian terjumlah di bawah s 37(1)(a)(iv) Akta tersebut yang memperuntukan bahawa satu awad boleh diketepikan sekiranya prosedur timbangtara tidak mematuhi apa yang dipersetujui oleh pihak-pihak. Sekiranya permohonan sedemikian di bawah s 46 Akta telah dibuat dan mahkamah telah memberikan perintah untuk melanjutkan masa, maka mandat dan bidang kuasa penimbangtara akan dihidupkan semula, tetapi tidak sekiranya sebaliknya. Pihak yang berdiam diri dan mengambil bahagian dalam timbangtara dan membenarkan penimbangtara untuk berurusan dengan apa yang merupakai pertikaian yang tidak difikirkan atau tidak membentuk terma penyerahan diri kepada timbangtara' sepertimana s 37(1)(a)(iv) boleh dikecualikan dariapda membangkitkan satu bantahan (lihat perenggan 143–145, 147 & 149).

(4) Seksyen 46 Akta tersebut menambah atau mementingkan dimensi bidang kuasa perkara 21.3 Kaedah PAM dan ianya merupakan asas kepada proses timbangtara. Oleh itu, sekiranya untuk apa-apa sebab yanag sah, satu awad timbangtara dilenggahkan dan masa tidak dilanjutkan, ianya adalah untuk pihak-pihak atau penimbangtara untuk memohon kepada mahkamah di bawah s 46 agar masa dilanjutkan untuk pemberian award. Mahkamah tidak boleh dengan sendirinya melanjutkan masa di bawah s 46 Akta tersebut. Ianya adalah masuk akal bahawa sekiranya tiada pelanjutan masa dipohon atau sekiranya dipohon

ianya gagal maka ada adalah tidak sah (lihat perenggan 153 & 156–157).

(5) Mahkamah bersetuju dengan HMT bahawa apabila gagal untuk memberikan award asal dalam tempoh masa yang ditetapkan dalam Kaedah PAM dan secara lanjut, gagal untuk melanjutkan tempoh masa sepertimana diperuntukan, sebelum memberikan award asal pada 10 Mac 2017, award asal diberikan tanpa mandat atau autoriti dan oleh yang demikian melampaui bidang kuasa penimbangtara. Award asal telah diketepikan secara sah dan betul selaras dengan s 37(1)(a)(iv) Akta tersebut (lihat perenggan 160).

(6) Dalam keadaan ini, mahkamah berpuas hati bahawa HMT telah mengarahkan mindanya keapda semua fakta yang relevan dan juga telah mengarahkan dirinya kepada prinsip undang-undang yang terpakai kepada kes dihadapannya. Perayu gagal untuk menunjukan apa-apa kekhilafan pada pihak HMT yang memerlukan campur tangan rayuan (lihat perenggan 161).]

Cases referred to

ASM Shipping Ltd of India v TTMI Ltd of England [2006] 2 All ER (Comm) 122, QBD (refd)

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal [2018] 4 MLJ 799, CA (refd)

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd [2016] MLJU 354; [2016] 1 LNS 1089; [2016] MLRHU 677, HC (refd)

Bidois v Leef [2015] 3 NZLR 474; [2015] BCL 256; [2015] NZCA 176, CA (refd)

Coal & Oil Co LLC v GHCL Ltd [2015] 3 SLR 154; [2015] SGHC 65, HC (refd)

Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389; [2003] 2 AMR 287; [2003] 1 CLJ 309; [2002] 2 MLRA 298, CA (refd)

Sunway Creative Stones Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and Anor [2020] MLJU 658; [2020] 1 LNS 529; [2020] AMEJ 0513, HC (not folld)

Thai-Lignite Co Ltd & Anor v Government of the Lao's People's Democratic Republic [2013] 3 MLJ 409; [2017] 9 CLJ 273; [2017] 1 LNS 1169; [2017] 6 AMR 219; [2017] AMEJ 0999, FC (refd)

Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd and others [2010] SGHC 20; [2010] 2 SLR 625, HC (folld)

Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161; [2013] 4 CLJ 193; [2013] 4 AMR 211; [2013] 3 MLRA 525, FC (refd)

Legislation referred to

Arbitration Act [SG] s 15

Arbitration Act 2005 ss 7, 7(b), 16, 18, 18(5), 35(1)(a), 36(2),

37(1)(a)(iv), (1)(a)(v), (2)(b)(ii), 42, 46, 46(3), (3)(a), (4) Rules of Court 2012 O 53 r 3(7)

Appeal from: Civil Suit Nos WA-24C(ARB)-13–04 of 2017 and WA-24C(ARB)-18–05 of 2017 (High Court, Kuala Lumpur)

Felix Dorairaj (Lim Kong Soon with him) (Dorairaj, Low & Teh) for the appellant.
Lam Ko Luen (Victoria Loi and Hoo Yee Huan with him) (Shook Lin & Bok) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] The main appeal before us is Appeal No W-02(C)(A)-1560–07 of 2018 ('Appeal 1560'). It raises several important and imperative questions concerning an arbitrator's mandate and jurisdiction as a result of his failure to deliver the arbitration award in accordance with the timeline stipulated in the rules of arbitration. Briefly, they are:

(a) whether rules of arbitration which stipulate that an award must be delivered by a certain date, are procedural or jurisdictional;

(b) whether rules of arbitration are to be construed as procedural if it stipulates that an award must be delivered by a certain date, but also allows the arbitrator to unilaterally extend time upon notification to the parties;

(c) whether parties who fail to raise any objection after the deadline for delivery of the award had passed and before the award is in fact delivered, are deemed as having waived their right to challenge the award;

(d) whether the failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, amounts to a waiver for purposes of s 7 of the Arbitration Act 2005 ('the Act') or as per the rules of arbitration such as for example article 20.1 of the Pertubuhan Akitek Malaysia ('PAM') Arbitration Rules (2003 Edition) ('PAM Rules');

(e) whether an arbitrator who delivers an award in breach of rules of arbitration which stipulate that the award must be delivered by a certain date (the deadline) and in further failing to extend the deadline albeit provided for in the rules eg article 21.3 of the PAM Rules, is an award which was delivered 'without mandate or authority' and is therefore in excess of jurisdiction and may be set aside pursuant to s 37(1)(a)(vi) of the Act on the grounds that 'the arbitral procedure was not in accordance with the agreement of the parties';

(f) whether s 18(5) of the Act is applicable in circumstances where the parties failed to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, and therefore precludes any challenge under s 37(1)(a)(vi) of the Act; and

(g) whether time may be extended by the court under s 46 of the Act for delivery of the award, albeit that there was no application by any of the parties, or by the arbitrator.

[2] This is an appeal against the decision of the learned judge of the High Court dated 9 July 2018 wherein an arbitration award dated 10 March 2017 (as amended by the subsequent award dated 7 April 2017) was set aside under s 37(1)(a)(vi) of the Act. Section 37(1)(a)(vi) of the Act provides that an award may be set aside if 'the arbitral procedure was not in accordance with the agreement of the parties'.

[3] The overarching issue is whether an arbitration award, which is issued in circumstances where the arbitrator was tardy in delivering the award in accordance with the timelines stipulated in the applicable rules of arbitration, can be set aside under s 37(1)(a)(vi) of the Act.

[4] It is relevant to mention that despite the arbitrator's tardiness, the parties to the arbitration did not raise any objection during the relevant period ie from the last date by which the award ought to have been delivered, until the date when the award was in fact delivered. The objection was only raised after the award was delivered on 10 March 2017.

[5] The appellant in the present appeal takes the position that such silence or inaction (on the part of the respondent) prior to the award being delivered on 10 March 2017 amounted to a 'waiver' of the irregularity in terms of the arbitrators' obligation to comply with article 21.3 of the PAM Rules ie the timelines for the delivery of the award.

[6] As mentioned earlier, the critical question is whether rules of arbitration which expressly stipulate a timeline for delivery of the award goes to the arbitrator's mandate and/or jurisdiction and consequently whether as a result of the non-compliance with the timeline, the arbitrator ceases to have the requisite mandate and/or jurisdiction.

THE APPEALS

[7] There are two appeals before us. The first appeal is Appeal 1560 and the second appeal is Appeal No W-02(C)(A)-1562–07 of 2018 ('Appeal 1562'). The appellant in both appeals is Ken Grouting Sdn Bhd ('KEN'). RKT

Nusantara Sdn Bhd ('RKT') is the respondent in both appeals.

[8] RKT has a cross-appeal in Appeal 1560. We heard the appeals on 8 September 2020. The decision of this court was delivered on 8 October 2020. We dismissed Appeal 1560 and the cross-appeal by RKT. We also dismissed Appeal 1562. We ordered KEN to pay a single set of costs, namely RM35,000 for Appeal 1560. These are the reasons for our decision.

The building contract

[9] KEN and RKT were parties to an arbitration before the learned arbitrator ('the arbitrator'). KEN was the claimant and RKT was the respondent in the arbitration. RKT had a counterclaim in the arbitration.

[10] The disputes between KEN and RKT arose out of a building contract based on the PAM Standard Form 1998 (Private Edition without Quantities) ('the building contract').

[11] By a letter of acceptance dated 11 July 2007, RKT as the employer, had appointed KEN as the contractor, for the construction and completion of substructure works for a ten storey commercial building along Jalan Raja Abdullah, Kuala Lumpur ('the works').

[12] The building contract is made up of articles and Agreement and Conditions of Building Contract (Private Edition Without Quantities) (1998) issued by PAM ('the conditions of contract') as amended and/or supplemented by the general conditions and preliminaries ('the general conditions and preliminaries'), which is to be read together with other documents bound together forming part of the contract ('the contract document').

The background

[13] The original contract sum was RM3,150,883. The original date for commencement of works was 1 August 2007 and the original date for completion was 8 April 2008 (ie a contract period of 36 weeks). However, KEN was unable to meet the deadline for completion on 8 April 2008. On 24 March 2008, KEN applied for an extension of time of 61 days from the architect.

[14] This was the first extension of time ('EOT') application. The architect granted ten days' extension of time, extending the date for completion to 18 April 2008. On 8 May 2008, KEN applied for a further extension of time of 162 days. This was the second EOT application. This application was revised to 273 days on 28 May 2008.

[15] On 13 June 2008, a lunch meeting was held between RKT's representatives, KEN's representative, and the architect. The parties have different versions of what transpired at this lunch meeting:

(a) RKT's version was that the meeting was an informal lunch meeting to ascertain the date that KEN would be completing the works; and

(b) KEN's version was that the purpose of the lunch meeting was to indicate that they would stop work due to under-certification of additional work and non-certification of the EOT No 2. KEN further claimed that it was agreed at the lunch meeting that the extension of time would be approved until 31 July 2008 provided that work is completed on the same date.

[16] On 19 September 2008, the architect granted KEN a further extension of time of 54 days to complete the works, extending the date for completion to 11 June 2008 ('the extended date for completion'). The works were practically completed on 30 July 2008.

[17] On 4 June 2008, the architect issued a certificate of non-completion ('first CNC') to KEN. However, RKT did not impose the liquidated and ascertained damages ('LAD') based on the first CNC.

[18] On 22 September 2008, the architect issued another certificate of non-completion ('second CNC') to KEN, replacing the first CNC. Based on the second CNC, the LAD sum of RM392,000 became due and owing from KEN to RKT.

[19] On 28 October 2008, RKT deducted the sum of RM392,000 as LAD from interim payment certificates Nos 8 and 9.

[20] KEN challenged RKT's claim for LAD. In view of the disputes between the parties, KEN commenced arbitration proceedings by a notice of arbitration dated 26 August 2009.

[21] On 21 December 2009, the arbitrator was appointed by the President of PAM as the sole arbitrator for the reference pursuant to cl 34.2 of the conditions of contract and in accordance with the PAM Rules, being the rules of arbitration which had been agreed by the parties to govern the arbitral procedure. Pursuant to cl 34.3 of the conditions of contract, the arbitrator shall, upon appointment conduct the arbitration in accordance with the provisions of the Act and the PAM Rules.

[22] Article 21.3 of the PAM Rules stipulates that the 'Arbitrator shall deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties'. In the present case, the

last closing statement from the parties was RKT's submission in reply dated 29 January 2016. As such, pursuant to article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was 26 April 2016.

[23] Article 21.3 had an in-built extension mechanism to cater for the eventuality where the three month time-line may not be sufficient for the preparation of an award.

[24] Article 21.3 of the PAM Rules expressly provided that if the arbitrator considers that more time is required for the preparation of his award, 'such time frame for delivery of the award may be extended by notification to the parties'.

[25] In the present case, the arbitrator did not issue any notification to extend the time frame for the delivery of the award. Thus the deadline of 26 April 2016 for the delivery of the award was not extended.

[26] The arbitrator delivered his award on 10 March 2017 ('the original award'). The original award was delivered without any attempt by the arbitrator to extend the timeline for delivery of the award. The arbitrator later amended the original award and issued an amended award on 7 April 2017 ('the amended award').

[27] During the period from 24 June 2016 to 10 March 2017, neither RKT nor KEN raised any objection to the fact that the deadline for delivery of the arbitration award had passed. It is beyond dispute that the original award (dated 10 March 2017) was well beyond the deadline.

The original award

[28] Under the original award, RKT was ordered to pay KEN the sum of RM710,614.25 and interest in the sum of RM198,099.58 failing which interest of 5% will be added to the sum of RM908,713.83. The arbitrator declared himself to be 'functus officio'.

[29] By letter dated 27 March 2017, the solicitors for RKT wrote to the solicitors for KEN giving notice that they are objecting to the delivery of the original award beyond the time-line stipulated in the PAM Rules and (without prejudice to their client's rights in that respect) of their intention to seek corrections to the original award pursuant to article 23 of the PAM Rules.

[30] On 29 March 2017 the solicitors for RKT wrote to the arbitrator requesting for corrections to be made to the original award pursuant to article 23 of the PAM Rules and/or s 35(1)(a) of the Act.

[31] KEN's solicitors issued a written reply to the arbitrator on 6 April 2017 stating in the main that the arbitrator was functus officio and that the corrections requested were in substance, not corrections under article 23 of the PAM Rules or s 35(1)(a) of the Act.

[32] Notwithstanding these objections, the arbitrator proceeded to issue the amended award on 7 April 2017 and again declared himself functus officio. The amended award directed RKT to pay the reduced sum of RM586,721.25 with interest in the sum of RM198,099.58 failing which interest rate of 5%pa shall be added to the amount of RM586,721.25.

[33] RKT applied via Originating Summons No WA-24C (ARB)-13–04 of 2017 ('OS13') to set aside the original award (and the amended award). RKT's application was based on, inter alia, s 37(1)(a)(vi) of the Act.

[34] KEN was obviously not happy with the amended award as RKT had been ordered to pay a significantly lesser sum as compared to the compensation ordered under the original award. KEN therefore applied via Originating Summons No WA-24C (ARB)-18–05 of 2017 ('OS18') to set aside the amended award and to reinstate the original award. KEN's application was based on ss 36(2), 37(1)(a)(iv), (1)(a)(v), 37(2)(b)(ii) and/or 42 of the Act.

[35] The High Court agreed with RKT.

[36] Thus, on 9 July, 2018, the learned judge of the High Court ('the judge') allowed OS 13 and set aside the original award (and the amended award). Consequently, OS 18 was dismissed.

[37] The judge held that by failing to deliver the original award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for before delivering the original award on 10 March 2017, the original award was delivered 'without mandate or authority' and was therefore in excess of jurisdiction. The judge set aside the original award (and the amended award) pursuant to s 37(1)(a)(vi) of the Act on the basis that 'the arbitral procedure was not in accordance with the agreement of the parties'.

Arguments (for KEN)

[38] Before us it was argued by counsel for KEN that the finding of the judge that the arbitrator did not comply with the PAM Rules and that the arbitrator ceased to have the mandate (and jurisdiction) to deliver the original award, is untenable.

[39] Counsel said that the PAM Rules in particular article 21.3 does not involve the jurisdiction of the arbitrator and that it is only a procedural provision. Counsel said that in any event, pursuant to article 20.1 of the PAM Rules and/or s 7 of the Act, RKT is deemed to have waived its right to object to the arbitrator's non-compliance with the PAM Rules.

[40] Counsel for KEN argued that the judge fell into error in finding that a breach of article 21.3 was a jurisdictional provision. He said that article 21.3 is clearly not a jurisdictional provision because of the arbitrator's unilateral right thereunder to extend the time for delivery of the award. He said article 21.3 cannot be jurisdictional because the arbitrator could in fact extend time on his own, without the consent of the parties. All he had to do was to notify the parties and time could be extended.

[41] According to counsel, article 21.3 should be read as merely providing a procedural mechanism that allows an arbitrator to notify the arbitrating parties when he will deliver his award to enable them to determine if he is complying with his obligation to carry out and complete the arbitration without undue delay.

[42] Counsel said that a party who wished to object to any non-compliance with article 21.3 by an arbitrator must bring this non-compliance to the arbitrator's attention promptly and without undue delay. The obligation to bring this non-compliance with article 21.3 to the arbitrator's attention promptly and without delay is implicit in article 20.1 of the PAM Rules and s 7 of the Act.

[43] According to counsel, both provisions have the effect that any failure by the parties to raise an objection in a timely manner to any non-compliance with the arbitration agreement will mean that the non-compliance are deemed waived.

[44] Article 20.1 of the PAM Rules is worded as follows:

> Article 20 — Waiver of Rules
>
> 20.1 A party who knows that any provisions of, or requirement under these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance shall be deemed to have waived his right to object.

[45] Section 7 of the Act reads as:

> 7 Waiver of right to object
>
> A party who knows —

A (a) of any provision of this Act from which the parties may derogate; or

(b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

B

[46] KEN contends that the judge failed to appreciate that RKT did not object to the failure of the arbitrator to comply with article 21.3 before the C publication of the original award and therefore RKT is deemed to have waived its right to object, both under article 20.1 of the PAM Rules and s 7 of the Act.

[47] According to KEN, if RKT had objected (which in this case it had not) and the arbitrator persisted in non-compliance then RKT would have its D remedy under s 16 of the Act which is to terminate his appointment. Section 16 of the Act provides that,

16 Failure or impossibility to act —

(1) Where an arbitrator becomes in law or in fact unable to perform the E functions of that office, or for other reasons fails to act without undue delay, that arbitrator's mandate terminates on withdrawal from office or if the parties agree on the termination.

(2) Where any party disagrees on the termination of the mandate of the arbitrator, any party may apply to the High Court to decide on such F termination and no appeal shall lie against the decision of the High Court.

(3) Where, under this section or subsection 15(2), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or subsection 14(3).

G

[48] KEN submitted that an arbitrating party cannot keep any non-compliance with an arbitration agreement or any defect in an arbitrator's appointment in 'reserve' and raise such non-compliance or defect as a ground H for challenging an award if the award is not in its favour.

[49] Counsel for KEN referred to the following cases:

(a) *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd* [2016] MLJU 354; [2016] 1 LNS 1089; [2016] MLRHU 677 (HC) ([35]–[37]) I (which was affirmed on appeal — [2018] 4 MLJ 799 (CA);

(b) *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154; [2015] SGHC 65 ([65]);

(c) *Bidois v Leef* [2015] 3 NZLR 474; [2015] BCL 256; [2015] NZCA 176 ([80]); and

(d) *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] 2 All ER (Comm) 122 ([49]).

[50] Counsel laid considerable emphasis on the High Court's decision in *Asean Bintulu*'s case ([35]–[37]):

> [35] It must be pointed out that the Arbitration in the present case was an ad hoc arbitration. There was no specific procedural rules adopted nor was there any specific timeline in which the Arbitrator has to render its Award. In an ad hoc arbitration, the arbitrator has a complete discretion on how the arbitration is to be conducted so long as the procedure adopted does not offend the rules of natural justice. This was underscored in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 (HL), p 985 where the House of Lords held:
>
> > I turn then to consider what the mutual obligation of the parties are in a private arbitration. *By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rules, the parties make the arbitrator the master of the procedure to be followed in the arbitration*.
> >
> > Apart from a few statutory requirements under the Arbitration Act 1950, which are not relevant to the instant case, he has a *complete discretion* to determine how the arbitration is to be conducted *from the time of his appointment to the time of his award*, so long as the procedure he adopts does not offend the rules of natural justice. (Emphasis added.)
>
> [36] Had the arbitration been under the KLRCA Arbitration Rules, then the safeguards of Rule 11(1) would have applied in that the arbitral tribunal shall render its final award within a period which is limited to 3 months and such time limit shall start to run from the date of the closing of final oral or written submissions.
>
> Further the arbitral tribunal shall inform the Director of the KLRCA of such date. Rule 11(2) provides that such time limit may be extended by the arbitral tribunal with the consent of the parties and upon consultation with the Director of the KLRCA.
>
> [37] I agree with learned counsel for WSB that there has been waiver on the part of ABF as it was (as was WSB) contented to do nothing and wait for the Award with the full knowledge of the delay. The law does not allow a party to adopt a 'head we win, tail you lose' attitude nor allow a party to keep the alleged non-adherence to rules 'up their sleeve' for later use to challenge the award if it is not in their favour (*Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, at page 227 [Hong Kong Court of Final Appeal]). After all, the option that ABF may request WSB to issue a joint communication to the Arbitrator is always open to it or to even jointly terminate the mandate of the Arbitrator.

[51] Counsel for KEN said (in the alternative) that even if the arbitrator's failure to comply with article 21.3 of the PAM Rules is jurisdictional and deprived him of the necessary jurisdiction to deal with the parties' claims in the arbitration, RKT's failure to raise this jurisdictional challenge in accordance with s 18(5) of the Act before the original award was published, disentitles RKT from now challenging the original award on jurisdictional grounds pursuant to s 37(1)(a)(vi) of the Act.

[52] Section 18 of the Act provides that:

> 18 Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
>
> (2) For the purposes of subsection (1) —
>
> (a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and
>
> (b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.
>
> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> (4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.
>
> (5) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings*.
>
> (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.
>
> (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.
>
> (8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.
>
> (9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
>
> (10) No appeal shall lie against the decision of the High Court under subsection (8). (Emphasis added.)

[53] Counsel for KEN supported his argument by referring to the Federal Court's decision in *Thai-Lignite Co Ltd & Anor v Government of the Lao's People's Democratic Republic* [2013] 3 MLJ 409; [2017] 9 CLJ 273; [2017] 1 LNS 1169; [2017] 6 AMR 219; [2017] AMEJ 0999 (FC) ('Thai-Lignite'). A

[54] He said that based on the Federal Court's comments in the *Thai-Lignite* case, any complaint that an arbitral tribunal is exceeding the scope of its authority during the course of the arbitration proceedings shall, by virtue of s 18(5) of the Act, 'be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings'. B C

[55] Counsel for KEN argued that it is implicit in the Federal Court's reasoning that if an arbitration party fails altogether to invoke the right to challenge an arbitrator's jurisdiction pursuant to s 18(5) of the Act on the ground that he is exceeding his jurisdiction while the arbitration proceedings were still going on, that party cannot thereafter claim to set aside the award pursuant to s 37(1)(a)(vi) of the Act. Essentially, it was argued for KEN that RKT should have raised an objection as soon as the deadline had passed ie after 26 June 2016 and at any rate, before the original award was published on 10 March 2017. D E

[56] Counsel said that in effect, the Federal Court's decision in the *Thai-Lignite* case applies the general principles of waiver to jurisdictional issues in arbitral proceedings by concluding that any failure by an arbitrating party to avail itself of the remedy to challenge an arbitrator's jurisdiction under s 18(5) of the Act before he publishes his award will disentitle him for challenging the award pursuant to s 37(1)(a)(vi) of the Act. F

[57] Counsel for KEN also contended that the judge ought to have in any event upheld the original award by invoking s 46 of the Act and extending time accordingly. G

[58] Section 46 of the Act reads as: H

46 Extension of time for making award —

(1) Where the time for making an award is limited by the arbitration agreement, the High Court may, unless otherwise agreed by the parties, extend that time.

(2) An application under subsection (1) may be made — I

(a) upon notice to the parties, by the arbitral tribunal; or

(b) upon notice to the arbitral tribunal and the other parties, by any party to the proceedings.

(3) The High Court shall not make an order unless —

(a) all available tribunal processes for obtaining an extension of time have been exhausted; and

(b) the High Court is satisfied that substantial injustice would otherwise be done.

(4) The High Court may exercise its powers under subsection (1) notwithstanding that the time previously fixed by or under the arbitration agreement or by a previous order has expired.

Arguments (for RKT)

[59] We may now turn to the arguments that were made on behalf of RKT.

[60] For RKT it was submitted that the judge was correct in setting aside the original award under s 37(1)(a)(vi) of the Act, as it is indisputable that the 'arbitral procedure was not in accordance with the agreement of the parties'.

[61] In amplification, counsel for RKT submitted that it is not in dispute that the arbitrator had failed to comply with the arbitral procedure as agreed by the parties, in the following manner:

(a) the parties agreed that the arbitrator is to conduct the arbitration in accordance with the arbitral procedure set out in the PAM Rules;

(b) article 21.3 of the PAM Rules stipulates that the 'Arbitrator shall deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties';

(c) the last closing statement from the parties was RKT's submission in reply dated 29 January 2016;

(d) therefore, pursuant to article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award falls on 26 April 2016;

(e) article 21.3 of the PAM Rules also expressly provides that if the arbitrator considers that more time is required for the preparation of his Award, 'such time frame for delivery of the award may be extended by notification to the parties';

(f) the arbitrator did not issue any notification to extend the time frame for the delivery of the original award. Consequently, the deadline of 26 April 2016 for the delivery of the original award was not been extended;

(g) the arbitrator proceeded to deliver the original award well beyond the deadline without even seeking to extend the same; and

(h) the conduct of the arbitrator is a clear breach of the agreed arbitral procedure and he had ceased to have the mandate and jurisdiction to deliver the original award.

[62] Counsel for RKT said that article 21.3 of the PAM Rules used the word 'shall' and it was therefore 'obligatory' for the arbitrator to comply with the deadline. He said article 21.3 of the PAM Rules is mandatory and it must therefore be strictly adhered to. Counsel referred to the case of *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389; [2003] 2 AMR 287; [2003] 1 CLJ 309; [2002] 2 MLRA 298 (CA) where the word 'shall' was construed as having a mandatory connotation.

[63] It was contended that where the arbitrator had failed to deliver the original award within the time frame agreed by the parties and failed to issue any notification to extend the time frame for delivery of the original award, then the result is that the arbitrator had adopted an arbitral procedure that was not in accordance with the agreement of the parties. Hence, by adopting an arbitral procedure that was not in accordance with the agreement of the parties, the arbitrator had exceeded the terms of his mandate which is to determine the dispute in accordance with the provisions of the PAM Rules and therefore, within the timeframe set out therein. In failing to do so, the arbitrator had exceeded his jurisdiction and the original award is therefore made in excess of jurisdiction (s 37(1)(a)(vi) of the Act).

[64] Counsel made reference to *Redfern & Hunter on International Arbitration* (5th Ed Oxford University Press, 2009), where the learned author said at pp 341–342 as follows (para 5.85):

> In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come. It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate. The rule to this elect is expressed in several different ways.
>
> Sometimes it is said that *an arbitral tribunal must conform to the mission entrusted to it; or that it must not exceed its mandate; or that it must stay within its terms of reference, competence or authority*.
>
> Another way of expressing the rule (which is followed in this book) is to state that an *arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence or authority*). (Emphasis added.)

[65] Counsel for RKT also referred to *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd and others* [2010] SGHC 20; [2010] 2 SLR 625 ('*Ting*'s case'), where the arbitrator had not adhered to the timeline for delivery of the award as per the rules of arbitration. In *Ting*'s case, the arbitration arose out of a dispute between a house-owner (Siraj and his wife, collectively 'the owners') and the contractor. The arbitration was conducted under the Singapore Institute of Arbitration Rules ('SIA Rules'). Under article 14.1 of the SIA Rules, the arbitrator was required to deliver the award within 60 days from

A the date when the hearing closed. The arbitration was fixed for hearing in two tranches from 21 November 2003.

[66] On 21 November 2003, a Friday, the owners failed to turn up. The arbitrator adjourned the hearing to Monday 24 November 2003. The owners B again failed to turn up and the arbitrator proceeded with a default hearing. The contractor presented its case and witnesses and the proceedings were completed the same day. On 1 December 2003, the arbitrator wrote to the parties asking for final submissions.

C

[67] The contractor sent in his written submissions on 12 December 2003, but the owners did not, claiming that the arbitration should not have proceeded in their absence. On 7 April 2004, the solicitor for Siraj, wrote to the arbitrator stating that time for the arbitrator to make his award had expired D under article 14.1 of the SIA Rules.

[68] The arbitrator did not communicate with the parties until 15 April 2005 when he informed the parties that his award was ready for collection and that the outstanding arbitration fees of $199,178.40 is to be paid.

E

[69] The arbitrator filed Originating Summons No 1807/2006 and applied for an extension of time to 15 April 2005 to publish his award and for his outstanding balance of arbitrator's fees to be paid.

F

[70] The arbitrator's application for extension of time was made pursuant to s 15 of the Singapore Arbitration Act 1985 which provides that, 'The time for making an award may be enlarged by order of the court or a judge thereof, whether the time for making the award had expired or not'. In response, the G owners filed Originating Summons No 1231/2008, applying, inter alia, for the award to be set aside.

[71] The learned judicial commissioner Mr Quentin Loh ('the JC') dismissed OS 1807/2006 and allowed OS 1231/2008 in part. The JC's disdain H for the arbitrator's delay of one year and four months is found in para [27] of the judgment which reads:

> [27] This delay of one year and four months resulted in a very unfortunate consequence. Article 14.1 of the Rules states.'Unless all the parties agree otherwise, the Arbitrator shall make his Award in writing within sixty (60) days from the date I or which the hearing is closed and shall state the reasons upon which his Award is based. The Award shall state its date and shall be signed by the Arbitrator.

[72] In para [32] of the judgment, the JC emphasised that arbitration was predicated on party autonomy and it is the agreement of the parties which gave

the arbitrator his mandate and jurisdiction.

[73] He went on to hold that *by reason of the delay, the arbitrator's mandate and jurisdiction ceases, unless time was extended before the expiry of the deadline*. The JC's opinion is at para [32] of the judgment and reads,

> [32] The Arbitrator's error in overlooking a time limit within which to issue his award was a very serious error. Party autonomy, which is a cornerstone of arbitration, has been emphasised time and again by our highest court.
>
> If the parties have chosen to agree to a time limit within which an arbitrator has to render his award and that contract or arbitration clause contains no provision to extend time, other than by mutual agreement, then no court is in a position to re-write the contract for the parties, (unless there is a statutory provision conferring such a power).
>
> For this reason, Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) warns at para 8-66:
>
> *A limit may be imposed as to the time within which the arbitral tribunal must make its award. When this limit is reached, the authority or mandate of the arbitral tribunal is at an end and it no longer has jurisdiction to make a valid award. This means there where a time-limit exists, care must be taken to see that either*:
>
> *the time-limit is observed; or the time-limit is extended before it expires.*
>
> *The purpose of time-limits is to ensure that the case is dealt with speedily; such limits may be imposed on the tribunal by the rules of an arbitral institution, by the relevant law, or by the agreement of parties*. (Emphasis added.)
>
> A substantially similar passage in the first edition of the above book was cited with approval in *Petro-Canada v Alberta Gas Ethylene Co* (1991) 121 AR 199 at 214; see also *Ian MacDonald Library Services Ltd v PZ Resort Systems Inc* (1987) 14 BCLR (2d) 273 where the court set aside an arbitration award made several months after the expiry of the time for making it; see also *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) para 20.102 n 6. As against that, Robert Merkin, *Arbitration Law* (Informa, Looseleaf Ed, 1991, May 2009 Release) states at para 18.29: '... The expiry of the time limit does not necessarily operate to remove the jurisdiction of the arbitrators, and there are a number of possibilities for the extension of time. In the first place, time may not be of the essence under the contract, so that its expiry has no effect.'
>
> With respect, I disagree with the foregoing statement by Merkin. *I am of the view that the statement in Law and Practice of International Commercial Arbitration, quoted above, is the correct analysis*. (Emphasis added.)

[74] As such, based on *Ting*'s case, it was argued for RKT that by failing to deliver the original award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline before 10 March 2017, the original award was delivered 'without mandate or

authority' and was therefore in excess of jurisdiction. Consequently, counsel for RKT contended that the judge did not commit any error in setting aside the original award under s 37(1)(a)(vi) of the Act.

[75] Finally, counsel for RKT touched on s 46 of the Act by way of response to KEN's complaints that the judge ought to have invoked s 46 of the Act and extended time accordingly. Counsel for RKT said the question of enlargement of time under s 46 of the Act does not arise because there was no application before the judge to extend time under s 46 of the Act and it is therefore unfair to suggest that the judge had failed to exercise her discretion to enlarge time.

[76] Counsel said that in any event, by virtue of the phrase 'shall not' in s 46(3) of the Act, the judge could not have made the order to extend time for the arbitrator to deliver the original award since s 46(3)(a) provides that 'all available tribunal processes for obtaining an extension of time have been exhausted' has not been fulfilled.

[77] In this connection, although the arbitrator could have sought to extend the time to deliver the original award by simply notifying the parties under article 21.3 of the PAM Rules, no such notification was ever issued by the arbitrator and thus the available tribunal processes have not been exhausted.

ANALYSIS AND FINDINGS

[78] For reasons which will become obvious, we think that it would suffice if we were to just deal with Appeal 1560. Consequently, if Appeal 1560 is dismissed, then RKT's cross-appeal will fall. And, if Appeal 1560 is dismissed, then Appeal 1562 will likewise fall in limine.

[79] In this case, the arbitration between KEN and RKT was conducted under the PAM Rules. Article 21.3 of the PAM Rules stipulates that the 'Arbitrator shall deliver his award as soon as practical but not later than 3 months from his receipt of the last closing statement from the parties'. Article 21.3 of the PAM Rules also expressly provides that if the Arbitrator considers that more time is required for the preparation of his sward, then 'such time frame for delivery of the award may be extended by notification to the parties'.

[80] In the instant arbitration, the last closing statement from the parties was RKT's submission in reply dated 29 January 2016. As such, pursuant to article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was 26 April 2016.

[81] As mentioned earlier, article 21.3 had an in-built extension mechanism to cater for the eventuality where the three month timeline may not be

sufficient for the preparation of an award. As such, if the arbitrator needed more time for the preparation of his award, he could have extended time for delivery of the award by duly notifying parties.

[82] However, the arbitrator did not issue any notification whatsoever to extend time for the delivery of the original award. Thus, the deadline of 26 April 2016 for the delivery of the award was not extended. KEN and RKT did not raise any objection and did not prompt or remind the arbitrator of the deadline under article 21.3 of the PAM Rules. RKT's conduct in not raising any objection before the original award was delivered on 10 March 2017 has formed the basis for KEN's contention that RKT had 'waived' their right to mount any challenge under s 37(1)(a)(vi) of the Act.

[83] In response, counsel for RKT said that his client was not under a duty to monitor the arbitrator and/or to remind him of the timeline. We will come to that in the later part in this judgment.

[84] What happened next is that the arbitrator issued the original award on 10 March 2017.

[85] Thereafter RKT made an application under article 23 of the PAM Rules (purportedly) for corrections to be made to the original award.

[86] However, RKT expressly reserved their right to challenge the original award due to the breach of article 21.3 of the PAM Rules.

[87] In any event, pursuant to RKT's said application, the arbitrator issued the amended award on 7 April 2017.

[88] RKT filed OS 13 to set aside the original award.

[89] KEN filed OS 18 to set aside the amended award and to reinstate the original award.

[90] On 9 July 2018, the learned judge ('the judge') allowed OS 13 and set aside the original award (and the amended award) under s 37(1)(a)(vi) of the Act on the basis that the 'the arbitral procedure was not in accordance with the agreement of the parties'. KEN's application, via OS 18 was dismissed.

[91] The judge held that by failing to deliver the original award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for before delivering the original award on 10 March 2017, the original award was delivered 'without

A mandate or authority' andtherefore in excess of jurisdiction.

[92] Before us it was argued by counsel for KEN that the finding of the judge that the arbitrator did not comply with the PAM Rules and that the arbitrator ceased to have a mandate (jurisdiction) to deliver the original award is
B untenable.

[93] Counsel said that the PAM Rules in particular article 21.3 does not involve the jurisdiction of the arbitrator and that it is procedural. Counsel for KEN said that in any event, RKT is deemed to have waived its right to object
C under article 20.1 of the PAM Rules and/or s 7 of the Act.

[94] In amplification, counsel for KEN argued that the judge fell into error in finding that a breach of article 21.3 was a jurisdictional provision.
D

[95] He said that article 21.3 is clearly not a jurisdictional provision because it gives the arbitrator the unilateral right to extend the time for delivery of his award.

E **[96]** He said that this merely provides a procedural mechanism that allows an arbitrator to notify the arbitration parties when he will deliver his award to enable them to determine if he is complying with his obligation to carry out and complete the arbitration without undue delay.

F **[97]** Counsel for KEN said that a party who wished to object to any non-compliance with article 21.3 by an arbitrator must proceed to bring this non-compliance to the arbitrator's attention promptly and without undue delay. The obligation to bring this non-compliance with article 21.3 to the
G arbitrator's attention promptly and without delay is implicit in article 20.1 of the PAM Rules and s 7 of the Act.

[98] According to counsel, based on both provisions, any failure by the parties to raise an objection in a timely manner in respect of any
H non-compliance will mean that the non-compliance are deemed waived.

[99] It was argued that the judge failed to appreciate that RKT did not object to the failure of the arbitrator to comply with article 21.3 before the publication of the original award and therefore RKT is deemed to have waived
I its right to object both under article 20.1 of the PAM Rules and s 7 of the Act.

[100] If RKT had objected (which in this case it had not) and the arbitrator persisted in non-compliance, then RKT would have its remedy under s 16 of the Act which is to terminate his appointment. Here again RKT did not do

invoke s 16 of the Act.

[101] It was also contended by counsel for KEN that in light of s 18(5) of the Act and the comments by the Federal Court in the *Thai-Lignite* case, it is way too late for RKT to raise this issue by way of OS13.

[102] It is relevant to mention that during the arguments before us, we were referred to the decision of the High Court in *Sunway Creative Stones Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and Anor* [2020] MLJU 658; [2020] 1 LNS 529; [2020] AMEJ 0513 ('the Sunway case'). The *Sunway* case was based on a similar fact pattern in that it also involved article 21.3 of the PAM Rules. The parties in the *Sunway* case were Sunway Creative Stones Sdn Bhd ('Sunway') and Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd ('YTL').

[103] In the *Sunway* case, the arbitrator did not deliver the award before the three-month deadline and further, did not notify the parties that he was extending time for delivery of the award. The arbitrator was in fact 3 1/2 years late in delivering the award. Ultimately, the award was in *Sunway*'s favour.

[104] During the relevant period, ie after the deadline had passed and before the award was issued, Sunway had reminded the arbitrator on four occasions that the award must be delivered in a timely manner. Sunway's reminders were copied to YTL's solicitors. YTL did not send any similar reminder to the arbitrator. YTL also did not raise any concerns with regard to the arbitrator's non-compliance with the deadline.

[105] YTL applied to set aside the award. YTL contended that the arbitrator failed to comply with the agreed arbitral procedure when he delivered the award well beyond three months of his receipt of the last closing submissions. As such, YTL sought to set aside the award under s 37(1)(a)(vi) of the Act. YTL relied upon several case laws but particular emphasis was placed on *Ting*'s case.

[106] Essentially, YTL argued that as a result of the arbitrator's non-compliance with article 21.3 of the PAM Rules, the arbitrator's mandate and jurisdiction had ceased. However, YTL's application was dismissed. YTL appealed to the Court of Appeal (via Court of Appeal Civil Appeal No W-02(C) (A)-2223–12 of 2019). YTL's appeal was discontinued on 3 July 2020. As such, the correctness of the High Court's decision in the *Sunway* case was not tested in the Court of Appeal.

[107] From our reading of the grounds of judgment, it appears that the learned judge in the *Sunway* case was of the opinion that YTL's silence was fatal to their application under s 37(1)(a)(vi) of the Act. As for *Ting*'s case, the High Court case was of the view that the case was of no assistance since in *Ting*'s case,

an objection was in fact raised by Siraj after the deadline for delivery of the award had passed and the issue of waiver did not arise in that case.

[108] The learned judge was of the view that since YTL failed to raise any objection at the appropriate time, such silence on their part amounted to a waiver of their right to mount a challenge under s 37(1)(a)(vi) of the Act.

[109] In gist, the High Court's ruling/decision was predicated on article 20.1 of the PAM Rules, s 7 of the Act and the Federal Court's comments in the *Thai-Lignite* case on the burden of an objecting party to raise jurisdictional objections timeously per s 18 (5) of the Act.

[110] In the *Sunway* case, the judge first identified the problem in [52]–[53] and said:

> [52] There is no ambiguity or complexity in the meaning of Article 21.3 PAM Arbitration Rules. It is clearly a provision to oversee the delivery of the Award by fixing an initial time frame of 3 months for the Arbitrator to do so, calculated from receipt of the last closing statement from the parties. In this case the due date fell on 1.9.2015. The Arbitrator obviously went way pass this deadline by publishing the Award on 18.3.2019. And this was done without notifying the parties of the need to extend the time to prepare and deliver the Award. On Sunway's part, four reminder letters were sent to the Arbitrator. As for YTL, there was complete silence.
>
> [53] Now, the pertinent question that arises is whether the Arbitrator had breached the arbitral procedure so as to render the Award susceptible to being set aside under subpara 37(1)(a) (vi) AA 2005.

[111] The judge then commented on *Ting*'s case and said:

> [56] In *Ting Kang Chung John*, the appellant arbitrator filed an OS seeking for an extension of time to publish his award in an arbitration between the second and third respondents/owners of a property and the first. respondent/contractor who was engaged by the former to demolish a house on the said property and reconstruct a larger one in its place. In response, the owners filed their own OS applying, among others, for the award, which was in fact issued by the arbitrator before his application for extension of time was made, to be set aside on the ground that the time for the arbitrator to make his award under Article 14.1 of the Singapore Institute of Architects ('SIA') Arbitration Rules had expired.
>
> YTL relied heavily on the decision of the Singapore High Court as it claimed that the factual matrix bears much resemblance to the instant matter before this Court. In its Written Submissions, YTL quoted the following passage from the judgment of Quentin Loh JC (as His Lordship then was): ...

[112] The judge then distinguished *Ting*'s case in paras [57]–[59]:

> [57] YTL quoted the afore said passage as reflecting the position taken by the

Singapore High Court that the arbitrator's failure to adhere to the agreed time limit meant that the award was issued without jurisdiction and the award was therefore declared void and of no effect. This is one of several instances which displayed the rather haphazard thinking behind the presentation of YTL's arguments as the grounds of challenge premised on procedural and jurisdictional points are fused together.

[58] Whilst at first blush there may appear to be similarities in the facts in Ting Kang Chung John and the present case, however, a deeper reading of the judgment in the former will reveal that the hearing at the arbitration proceeded only with the first. respondent/contractor's case since the second and third respondents/owners failed to turn up on the hearing dates. Upon completion of proceedings, the contractor sent his written submissions but the owners did not because they claimed that the arbitration should not have proceeded in their absence.

In fact the solicitor for the third respondent had written to the arbitrator stating that time for the arbitrator to make his award had expired under Article 14.1 SIA Arbitration Rules which provides that unless all the parties agree otherwise, the arbitrator shall make his award in writing within 60 days from the date on which the hearing was closed. Thereafter, the arbitrator did not communicate with the parties for one whole year until he suddenly informed them that his award was ready for collection. Another disagreement arose over the arbitrator's fees and when the arbitrator subsequently asked the parties to agree to extend the time to publish the award, the owners refused. The High Court declined the arbitrator's application to extend the time for him to render his award on the ground that none of the factors put forward by the arbitrator to justify the lateness of the award constituted good reasons to allow the application.

[59] Based on the above summary, *the facts in Ting Kang Chung John include an objection by the third respondent/owner as regards the arbitrator's failure to comply with Article 14.1 SIA Arbitration Rules before the publication of the arbitral award, an action which is sorely missing on YTL's part in the instant case. The question as to whether there was a waiver of the arbitration rules thus did not arise in Ting Kang Chung John.*

[113] The judge then said,

[68] Having considered the five authorities from beyond our shores, I find that there is merit in Sunway's submissions that:

(a) *Ting Kang Chung John*, Petro-Canada and Flock *involved clauses in arbitration agreements that set firm time limits for delivering an award that could not be extended by the arbitrators in each case without the clear consent of the arbitrating parties. It is for this reason that the time provisions in the arbitration agreements in these cases were clearly jurisdictional in nature.*

Notwithstanding the jurisdictional nature of the time related provisions in the arbitration agreements, the court in each case looked into the issue as to whether the party seeking to set aside the arbitral award made a timely objection to the arbitral tribunal's non-compliance with the time-related arbitral provisions before the contested award was made. In *Petro- Canada* and *Flock*, this issue

was particularly important because waiver was contested on the facts of these cases; and

(b) *the judgments in Ting Kang Chung John*, *Petro-Canada and Flock demonstrate that even where time related arbitral provisions in an arbitration agreement are jurisdictional in nature, the doctrine of waiver is applicable to determine if an arbitrating party loses the right to complain about any non-compliance with such provisions by an arbitrator. An arbitrator does not automatically lose the right to deliver his award simply because the time for delivering his award expires; the arbitrating parties must take positive steps to either terminate his mandate or risk losing the right to complain about the loss of the arbitrator's mandate once he publishes his award*. The findings in Metcalfe 's case exemplifies this principle.

[114] In para [88] the judge also dealt with the utility of s 46 of the Act in terms of the availability of the court's power to extend time. She said:

> [88] Applying all of the above mentioned provisions and governing principles to the facts in the matter at hand, YTL was undoubtedly aware of Clause 22.3 CoC and paras 2.2 and 2.3 of the Order For Directions No. 3 that the arbitration proceedings would be in accordance with AA 2005 and the PAM Arbitration Rules whereby the clock for the Award to be delivered had begun ticking from 1.6.2015, being the date when the Arbitrator received YTL's Reply. It is most unfortunate that the Arbitrator, upon realising that he will not be able to meet the deadline of 3 months from 1.6.2015, did not notify the parties, before the time frame lapsed, that he was extending the same to complete and deliver the Award. Even upon the expiry of the time limit, all is not lost because the Arbitrator, YTL or Sunway could have made an application under sub-s 46(2) AA 2005 to extend the time for the Award to be delivered.
>
> In this regard, para 46(3)(a) makes it clear that before going to court, the parties shall first exhaust all available processes for obtaining an extension, for example, by applying to the arbitral tribunal itself (see The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia, supra, at pp 217–219).

[115] Finally, in [89]–[92] the judge explained that keeping silent was not an option and that such conduct constitutes a 'waiver' and precludes a party from raising any objection under s 37(a)(1)(vi) of the Act. In this regard, the judge said,

> [89] The parties are under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay: per Lord Diplock in *Bremer Vulkan* (at p 986). On Sunway's part, its solicitors had written four letters on 4.2.2016, 4.1.2017, 22.11.2017 and 5.12.2018 to the Arbitrator, and each one was copied to YTL's solicitors, to remind the Arbitrator to deliver his Award. The Arbitrator finally wrote back vide letters dated 14.12.2018 and 27.1.2019. YTL surely cannot claim to be oblivious to the delay in light of these four letters written by Sunway and two by the Arbitrator. YTL definitely had more than ample time before the Award was published to raise its objections and to

pursue whatever remedies it deemed fit, inter alia, under s 16 (as was the scenario in N.B.C.C. Ltd. under the equivalent provision in India) or s 18 of the AA 2005.

[90] By remaining silent and taking a gamble in not raising any objection in the hope that its counterclaim against Sunway would be allowed by the Arbitrator, YTL must be deemed to have waived its right to object pursuant to s 7(b) of the AA 2005 and Article 20.1 PAM Arbitration Rules. YTL's argument that these provisions do not apply because there is no longer an ongoing or subsisting arbitration when the Arbitrator's mandate lapsed on 1.9.2015 is, with respect, erroneous. At the risk of repetition, the Arbitrator's mandate did not automatically end after 1 September 2015. The arbitration remained afoot and sub-s 46(4) of the AA 2005, which allows an extension of time for making an award to be granted by the High Court notwithstanding that the time previously fixed by, or under, an arbitration agreement has expired, justifies this conclusion.

[91] Sunway's letters of reminder to the Arbitrator reflects its stance on the circumstances as it then stood. It is then up to YTL to either file an application under s 16 or s 46 of the AA 2005 to terminate the Arbitrator's mandate or for an extension of time for the Arbitrator to deliver the Award, respectively. YTL chose to be a mere observer and this turned out to be to his own detriment.

[92] In the upshot, YTL's application to set aside the Award on the ground of the Arbitrator's delay is not bona fide and is akin to YTL wanting to set aside the Award because the outcome is not in YTL's favor.

In not objecting to the delay until after the Award was made, YTL is deemed to have waived its right to do so and is therefore precluded from challenging the Award pursuant to subpara 37(1)(a) (vi) AA 2005 on the ground that the Arbitrator's delay amounted to a breach of his obligation to complete the arbitration without undue delay.

[116] As we said earlier, the correctness of the *Sunway* case was not tested in the Court of Appeal. Thus, other than referring to the passages reproduced in the preceding paragraphs, we do not think that we should say anything more about that case. But, before we leave the *Sunway* case, it is important to state that the *Sunway* case was decided by the High Court on 7 November 2019, whereas the decision of the High Court in OS13 and OS18 (which are relevant to the present appeals) was given on 9 July 2018. Hence, the judge in the instant case did not have the benefit of the views held by the High Court in the *Sunway* case.

[117] At any rate, based on the reasons as articulated in the concluding parts of this judgment, it will be clear that we are not inclined to agree with the decision of the High Court in *Sunway*'s case.

[118] We may now return to the narrative of Appeal 1560.

[119] The primary question of importance here is whether the timeline for

delivery of an arbitration award which is stipulated in the rules of arbitration is a procedural provision or whether it is jurisdictional. And if the timeline is determined to be jurisdictional, then the next question is whether there could be any waiver.

[120] Lastly, whether the arbitrator ceases to have the mandate and exceeds his jurisdiction by delivering the original award in breach of the timeline which is stipulated in the rules of arbitration.

[121] We will start by referring to *Ting*'s case. In *Ting*'s case the High Court in Singapore held at [32]:

> [32] The Arbitrator's error in overlooking a time limit within which to issue his award was a very serious error.
>
> Party autonomy, which is a cornerstone of arbitration, has been emphasised time and again by our highest court. If the parties have chosen to agree to a time limit within which an arbitrator has to render his award and that contract or arbitration clause contains no provision to extend time, other than by mutual agreement, then no court is in a position to re-write the contract for the parties, (unless there is a statutory provision conferring such a power). For this reason, Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) warns at para 8-66:
>
> *A limit may be imposed as to the time within which the arbitral tribunal must make its award. When this limit is reached, the authority or mandate of the arbitral tribunal is at an end and it no longer has jurisdiction to make a valid award*. This means there where a time-limit exists, care must be taken to see that either:
>
> *the time-limit is observed; or the time-limit is extended before it expires.*
>
> *The purpose of time-limits is to ensure that the case is dealt with speedily; such limits may be imposed on the tribunal by the rules of an arbitral institution, by the relevant law, or by the agreement of parties*. (Emphasis added.)
>
> A substantially similar passage in the first edition of the above book was cited with approval in *Petro-Canada v Alberta Gas Ethylene Co* (1991) 121 AR 199 at 214; see also *Ian MacDonald Library Services Ltd v PZ Resort Systems Inc* (1987) 14 BCLR (2d) 273 where the court set aside an arbitration award made several months after the expiry of the time for making it; see also *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) para 20.102 n 6.
>
> As against that, Robert Merkin, *Arbitration Law* (Informa, Looseleaf Ed, 1991, May 2009 Release) states at para 18.29: '... The expiry of the time limit does not necessarily operate to remove the jurisdiction of the arbitrators, and there are a number of possibilities for the extension of time. In the first place, time may not be of the essence under the contract, so that its expiry has no effect.'
>
> With respect, I disagree with the foregoing statement by Merkin. *I am of the view that the statement in Law and Practice of International Commercial Arbitration,*

quoted above, is the correct analysis. (Emphasis added.)

[122] The argument that was advanced on behalf of KEN on the procedural vs jurisdictional dichotomy was that article 21.3 is procedural and not jurisdictional because of the arbitrator's ability to extend time by giving notice to the parties. Thus, the argument that was made on behalf of KEN amounted to this: the in-built contractual mechanism which enabled the arbitrator to extend time does not sit well with RKT's proposition that the rule is jurisdictional in nature.

[123] In light of the argument that was made by counsel for KEN that article 21.3 is to be construed as a procedural provision without any jurisdictional content because of the ability of the arbitrator to extend time, we considered it necessary to look at the analogous legal position in judicial review proceedings where the 'jurisdiction' of the court is predicated on a fixed timeline, which is subject to being extended in a fit and proper case.

[124] In the realm of judicial review proceedings, it is trite that time for commencement of judicial review goes to the jurisdiction of the court. In *Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161; [2013] 4 CLJ 193; [2013] 4 AMR 211; [2013] 3 MLRA 525 (FC):

> [30] ... *the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction* and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant. (Emphasis added.)

[125] It will be seen at once that although the court has the discretion (per O 53 r 3(7) of the Rules of Court 2012) to extend time for commencement of judicial review proceedings, *time is nevertheless a jurisdictional matter in that context*. Thus, if an application for judicial review is made out of time, and if there is no application to extend time, and/or if the application for extension of time fails, then the judicial review falls in limine as the court will lack the requisite jurisdiction to hear the judicial review application.

[126] Consequently, applying the logic of that principle to the instant case, we do not agree that the mere presence of an in-built contractual mechanism per article 21.3 of the PAM Rules, which enables the arbitrator to unilaterally extend time derogates from the arbitrator's duty to deliver the award within the time period as prescribed in article 21.3 and which necessarily and fundamentally affects the arbitrator's mandate and therefore, his jurisdiction.

A **[127]** We find the suggestion that was made on behalf of KEN that the arbitrator's ability to extend time unilaterally is indicative of it being procedural rather than jurisdiction to be flawed.

B **[128]** In our view, the timeline in article 21.3 is a mandate to the arbitrator that he is to deliver the award by a certain date and if requires more time, then he has to extend time by notifying the parties. The arbitrator's mandate is not a matter of mere procedure. Rather, the arbitrator's jurisdiction springs from his mandate. Once the mandate ceases, then the jurisdiction also ceased.

C **[129]** In the *Sunway* case, the High Court said that not doing anything and remaining silent is not an option for YTL, the objecting party. We disagree with that approach.

D **[130]** The real focus should be on the arbitrator and the correct statement of law is that it is not an option for an arbitrator who conducts an arbitration under a time-sensitive arbitral regime to ignore, or be oblivious to, or be nonchalant to his duty and responsibility to deliver the award on time. And this particularly more compelling when the arbitrator could have very easily
E extended time by the simple act of notifying the parties.

[131] As such, we find the arbitrator's tardiness to be egregious and inexcusable. We also note that the arbitrator did not make any application to the court for time to be extended under s 46 of the Act.
F

[132] We may now return to *Ting*'s case. In *Ting*'s case, the issue of waiver was not discussed because the respondent (Siraj) had in fact raised an objection after the deadline for delivery of the award had passed. We are also aware that
G article 14.1 of the SIA Rules did not give the arbitrator any unilateral power to extend time (unlike the present case before us).

[133] In the *Sunway* case, the judge thought that the abovementioned features of *Ting*'s case made a difference. We do not think so. In our view, even
H if the rules of arbitration empowered the arbitrator to extend time (if he felt it was necessary) and even if there was no objection by the parties after the deadline had passed, the failure on the part of the arbitrator to adhere to the timeline stipulated in the rules of arbitration is of itself, fatal, as such non-compliance with a crucial timeline deprives the arbitrator of his mandate
I and therefore his jurisdiction.

[134] We therefore reject the suggestion that article 21.3 is merely procedural. On the contrary, we find that it is inherently and fundamentally, jurisdictional.

[135] The principle that may be culled from *Ting*'s case which we find relevant and applicable to the present case, is that where the rules of arbitration stipulate that an award is to be delivered by a certain date, then if the time limit or deadline is reached, the authority or mandate of the arbitrator is at an end. Simply put, the authority or mandate of the arbitrator dissipates, and he no longer has the requisite jurisdiction to make a valid award.

[136] The principle in this regard applies regardless of whether the relevant rules of arbitration allows the arbitrator to extend time. Indeed, the fact that time could be extended by the arbitrator *sou motu* goes to show that time is in fact critical and if necessary, the arbitrator must extend it. As mentioned earlier, under article 21.3 of the PAM Rules the arbitrator would have had absolutely no difficulty as the extension was 'in his hands' so to speak.

[137] Thus, so long as the timeline for delivery of the award has passed and time (for delivery of the award) has not been extended as per the rules of arbitration, then the arbitrator's authority, mandate and jurisdiction would have ceased.

[138] In such circumstances, article 21.3 is no longer at play and what the arbitrator must then do is to procure the consent of the parties to resurrect his mandate and jurisdiction. And if one or both parties do not consent, then the arbitrator's only option would be to apply to the High Court for time to be extended (per s 46 of the Act).

[139] Obviously, the losing side will not consent. As such, the arbitrator has no choice and must move the court under s 46 of the Act. Of course, parties could also make the application but then it is only the arbitrator who would be able to make out a fit and proper case to explain the reasons for the delay.

[140] As we said earlier, in the present case the arbitrator could have very easily extended time by notifying parties and thereby kept his mandate and his jurisdiction intact. Rather unfortunately, he did not do so.

[141] We will now deal with KEN's suggestion that RKT should have raised objection before the delivery of the original award. The first point we make is that parties to an arbitration are not under duty to monitor the timelines or to remind or prompt the arbitrator about the timeline. That is plainly the arbitrator's job. After all, he is paid to be the arbitrator.

[142] Hence, in a time-sensitive arbitration, the proverbial guillotine falls once the deadline has passed and time has not been extended. Thus, we agree with the learned authors of *Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides Law and Practice of International*

Commercial Arbitration (Sweet & Maxwell (4th Ed) 2004) who explained at paras 8–66 that, 'When this limit is reached, the authority or mandate of the arbitral tribunal is at an end and it no longer has jurisdiction to make a valid award'. As stated earlier, the timeline for delivery of the award (article 21.3) goes to the arbitrator's mandate and jurisdiction.

[143] On the issue of waiver, we take the view that whilst generally there can be a waiver of the matters or content of what is deliberated or what transpires in the arbitration proceedings, there can be no waiver on the part of the parties to the arbitration with respect to the cessation of the arbitrator's mandate and jurisdiction in relation to the obligation to deliver the award on time or within an extended period. Hence, RKT's silence or inaction prior to the original award being issued is irrelevant.

[144] Since the arbitrator ignored, or overlooked, or was plainly oblivious or nonchalant to the timeline stipulated in article 21.3 of the PAM Rules, and as there is no scope for any waiver, it follows that the arbitrator was no longer following the rules of arbitration.

[145] Such conduct on the arbitrator part falls neatly within s 37(1)(a)(vi) of the Act which provides that an award may be set aside if 'the arbitral procedure was not in accordance with the agreement of the parties'.

[146] For completeness, we may also mention that s 46 of the Act gives the court power to extend time. KEN contends that the judge ought to have extended time.

[147] It is relevant to note that there was not even an application before the judge for her to consider and to exercise her powers. Of course, this is on the assumption that there are merits for such an application. Thus, if an application under s 46 of the Act had been made and the court had granted an extension of time then the arbitrator's mandate and jurisdiction would have been resurrected, but not otherwise.

[148] As for the *Thai-Lignite* case, although the Federal Court had enunciated that a party who wished a jurisdictional objection (per s 37(1)(a)(iv) and (1)(a)(v) of the Act) must do so at the earliest opportunity and at any rate whilst the proceedings are afoot (per s 18(5) of the Act), in our view an objection pertaining to the cessation of an arbitrator's mandate and jurisdiction specific to the arbitrator's failure to deliver the award as per the timeline stipulated in the rules of arbitration is an objection which is to be taken under s 37(1)(a)(vi) of the Act as the arbitrator would then be following a timeline of his own choosing instead of what the parties had agreed upon.

[149] Thus, following the *Thai-Lignite* case, parties who remain silent and participate in the arbitration and allow an arbitrator to deal with a 'dispute not contemplated by or not falling within the terms of the submission to arbitration' per s 37(1)(a)(iv) or allow an arbitrator to deal with matters beyond the scope of the submission to arbitration per s 37(1)(a)(v) may be precluded from raising an objection (s 18(5) of the Act).

[150] As we said earlier, article 21.3 of the PAM Rules pertains to the arbitrator's mandate and therefore his jurisdiction. It is of course tempting to leap to the conclusion (as can be seen from the *Sunway* case) that based on a plain reading of article 20.1 of the PAM Rules and s 7 of the Act, silence on the part of the parties will preclude any challenge to the validity of the award under s 37(1)(a)(vi) of the Act.

[151] No doubt at first blush, the approach which was taken by the High Court in the *Sunway* case appears to dovetail with the Federal Court's comment in the *Thai-Lignite* case as to the burden on the objecting party to raise the objection timeously per s 18(5) of the Act. But, it is important and significant to appreciate that the Federal Court's comments vis a vis s 18(5) of the Act was targeted at objections falling under s 37(1)(a)(iv) and (1)(a)(v) of the Act. *The Federal Court was not dealing with an objection under* s 37(1)(a)(vi) of the Act and was most certainly not dealing with a failure by the arbitrator to deliver his award as per the timeline stipulated in the relevant rules of arbitration. Thus, to that extent the Federal Court's comments, even if they are applicable, are obiter.

[152] The situation which obtains here is different from challenges which are ordinarily taken by an objecting party. Thus, although in the ordinary course of events, s 7 and s 18(5) of the Act could be called in aid to preclude a party from seeking to mount a challenge under s 37(1)(a)(vi) of the Act, a challenge to the validity of an award which was delivered by the arbitrator in breach of the timeline stands on a different footing and this is essentially because of s 46 of the Act.

[153] It is obvious enough that s 46 of the Act is the last resort provision on the time sensitive aspect of the arbitration. Section 46 of the Act enables parties or the arbitrator to apply to the court to extend time for the delivery of the award, and thereby regularizing that which must otherwise be necessarily *invalid*.

[154] In our view, s 46 of the Act cuts right through the contractual provisions and/or the conduct of the parties so that it becomes immaterial whether there was an in-built extension of time provision and whether any objection was raised by the parties before the award was delivered.

[155] Of course, the conduct of the parties, length of the delay, complexity of the issues etc will be relevant as these would, inter alia, inform the court's discretion whether time should be extended for delivery of the award. The fact that s 46 of the Act exists as a specific statutory provision to enable a court to extend time for delivery of an arbitration award speaks volumes as to the importance that has been placed on the time-sensitive nature of the arbitration.

[156] In our view, s 46 of the Act adds to or underscores the jurisdictional dimension of article 21.3 of the PAM Rules, and it is quite fundamental to the arbitral process. Thus, if for any valid reason, an arbitration award is delayed and time has not been extended, then it is up to the parties or the arbitrator to move the court under s 46 of the Act so that time is extended for the delivery of the award.

[157] It follows as a matter of logic that if no extension is sought under s 46 of the Act, or if sought and the application fails, then the award is quite figuratively 'dead in the water'.

Summary of conclusions

[158] Before we end this judgment, we think that it would be helpful to summarise the court's conclusions on the several questions/issues which arose in the appeal.

[159] Our conclusions may be stated as follows:

(a) rules of arbitration which stipulate that an award must be delivered by a certain date are time-sensitive. It is therefore mandatory for the arbitrator to comply with such a provision as it affects the arbitrator's mandate, and therefore his jurisdiction;

(b) rules of arbitration which stipulate that an award must be delivered by a certain date and which also allow the arbitrator to unilaterally extend time upon notification to the parties, are equally time-sensitive and affect the arbitrator's mandate, and therefore his jurisdiction. The arbitrator's ability to unilaterally extend time upon notification to the parties does not ipso facto render these as a mere procedural provisions;

(c) there is no general burden or positive duty on parties to raise any objection after the deadline for delivery of the award had passed and before the award is in fact delivered. Consequently, there is no waiver by the party who does not raise any objection. After the deadline for delivery of the award had passed, *the arbitrator's mandate and jurisdiction ceases*. Therefore, the failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, is not a waiver;

(d) the arbitrator's failure to deliver the award by the deadline and the failure to extend time as per the rules results in a cessation of the arbitrator's mandate and jurisdiction. The award is therefore a nullity and remains so unless extended under s 46 of the Act. There is no waiver pursuant to article 20.1 of the PAM Rules or pursuant to s 7 of the Act;

(e) an award which is delivered in breach rules of arbitration which stipulate that the award must be delivered by a certain date (the deadline) and where the deadline has not been extended albeit provided for in the rules, is 'without mandate or authority' of the arbitrator and therefore in excess of his jurisdiction and may be set aside pursuant to s 37(1)(a)(vi) of the Act;

(f) the failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, does not preclude a challenge under s 37(1)(a)(vi) of the Act. Section 18(5) of the Act is not applicable as the award is a nullity, until and unless it is extended by the consent of the parties or by an order of court under s 46 of the Act; and

(g) the court may not extend time on its own volition under s 46 of the Act. The parties or the arbitrator have to make an application for purposes of s 46 of the Act. *Ting's* case provides useful guidance as to the considerations which are relevant to an application for extension of time.

[160] In the result, we agree with the judge that by failing to deliver the original award within the time frame stipulated in the PAM Rules (dateline of 26 April 2016) and in further failing to extend the deadline as provided for, before delivering the original award on 10 March 2017 (about 13 months later), the original award was delivered 'without mandate or authority' and is therefore in excess of the arbitrator's jurisdiction. The original award (and by extension the amended award) was properly and validly set aside pursuant to s 37(1)(a)(vi) of the Act.

[161] In the circumstances, for the reasons stated above, we are satisfied that the judge had applied her mind to all the relevant facts and circumstances of the case and had also properly directed herself upon the principles of law that were applicable to the case before her. KEN has therefore failed to demonstrate any error on the part of the judge as would warrant any appellate intervention.

RESULT

[162] We are therefore impelled to the conclusion that there are no merits in Appeal 1560 and it is hereby dismissed. RKT's cross-appeal is likewise dismissed.

[163] Consequently, Appeal 1562 is also dismissed. KEN is to pay costs of RM 35,000 (subject to allocator) to RKT in respect of Appeal 1560. We make no order as to costs for RKT's cross appeal in Appeal 1560. We make no order as to costs for Appeal 1562.

Order accordingly.

Appellant's appeals dismissed with costs of RM35,000 for Appeal 1560 and respondent's cross-appeal dismissed.

Reported by Mohd Kamarul Anwar